

**NOTARY LAW & ETHICS FOR LAWYERS & BUSINESS PROFESSIONALS
IN MONTANA
2018**

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3.5 HOURS ... HALF-DAY NOTARY CLE PROGRAM

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Introduction

A. Review of Handout/Supplementary Materials

B. Citation of Authority Abbreviation Key:

Model Notary Act of 2010 = MNA

Montana Code Annotated = MCA

Montana Notary Public Handbook of 2017 & 2018 = MNPH

Closen, Notary Law & Practice [1997 casebook] = NLPB

Closen, Notary Best Practices [2018 book] = NBPB

NNA Notary Public Code of Professional Responsibility of 1998 = NPCPR

ASN Responsibility Code of Ethics of 1980 = ASNRCE

Revised Uniform Law on Notarial Acts of 2010 = RULONA

Special Note: This model statute has been adopted in nine states [Colorado, Idaho, Iowa, **Montana**, North Dakota, Oregon, Pennsylvania, Washington, and West Virginia], and is under consideration in a number of other jurisdictions [including District of Columbia, Georgia, Kentucky, Maine, Minnesota, New Jersey, South Dakota, and Vermont]. With notes and comments, it is 60 pages in length. It is likely to be widely enacted.

C. Hypotheticals & Questions

1. HYPO. Late one afternoon, a non-attorney notary was presented with an affidavit for notarization by a frequent customer of the notary. According to the customer, the affidavit had already been signed by the customer's spouse who was feeling ill and who could not appear in person. The notary had never met the spouse. As the affidavit concerned a time-sensitive matter, the affidavit needed to be notarized that day. The customer assured the notary of the validity of the spouse's signature and the spouse's desire to have the affidavit notarized. The customer even offered to call the spouse in order to confirm all of those matters over the phone with the notary. The notary declined the offer and proceeded with the notarization of the signature appearing on the document, and the notary either omitted to prepare a notary journal for this notarization or prepared a journal entry except for the signature of the document signer [with the assurance of the client that the spouse would visit the notary shortly and sign the journal]. The affidavit was filed in a court case later that day and served upon opposing counsel.

QUESTIONS. Did the notary act properly here? Should the notary have called the wife on the phone in order to obtain the wife's telephonic acknowledgment that she had signed the document? How many statutory violations have been committed by the notary? How many ethics violations have been committed by the notary?

*See the Montana Supreme Court case of *McWilliams v Clem*, 743 P2d 577 (1987). Also found in NLP casebook, pages 288-289.

2. HYPO. A professional (a banker, real estate agent, mortgage broker, health care professional, accountant, financial planner, or attorney), who is also a notary, has prepared an important time-sensitive document for a client in a pending transaction. As the deadline is today, the professional-notary has an appointment with the client for early this afternoon to review and sign the document – so that it can be timely delivered by day's end. Something happens to the client, causing the client not to appear. The professional-notary decides to sign the client's name to the document, to notarize the signature, to also sign the client's name to the notary journal entry for the notarization [or to omit to complete any notary journal entry for this notarization], to deliver the document today in order not to miss the critical deadline.

QUESTIONS. How many statutory violations have been committed by the professional-notary? How many ethics violations have been committed by the professional-notary?

3. HYPO. When a notary attends the signing of a document for an elderly signer, who was not known to the notary, the elderly individual retrieved a signature stamp [containing a handwritten script-style signature] for use as the present signature.

QUESTIONS. Would you proceed to perform the notarization? What procedure should be used to complete the notary journal entry? What steps other than those you ordinarily take in conducting a notarization would you take under these circumstances?

4. HYPO. At 10:AM, the signer attended the execution of a real estate deed document at a bank (or mortgage company) before a company notary. The signer signed the document in the presence of the notary, and the document required that an acknowledgment be affixed by the notary. However, the notary explained that due to heavy business volume the notary would have to complete the acknowledgment form later and would mail a copy to the signer. The notary also had the signer sign the notary's journal on a blank line (where chronologically the next of the notary's notarizations was to be recorded). At 4:00 PM, the notary completed the acknowledgment certificate and the notary journal entry relating to this transaction.

QUESTIONS. Was this procedure proper? If not, why? What opportunities for complications and wrongdoing were invited by this procedure?

Section 1 ... Notary Basics

A. Central Role of Notary and Notarizations

[1] Impartial Witness Heightens Document Security

"A notary acts as an official, unbiased witness to the identity, the comprehension, the intent and signature of the person who comes before the notary for a specific purpose." MNPH, page 2.

"The Notary shall act as an impartial witness..." NPCPR, Guiding Principle II.

However, notaries are not 'document police,' nor do notarizations validate or legalize documents as too many people commonly believe.

"A notary public does not 'legalize' documents, or verify the accuracy or truthfulness of statements in a document ..." MNPH, page 1.

*See also, NBPB, Chapter 19, Notary Ethics & Avoiding Conflicts of Interest.

[2] Notary Is a Public Official with Fiduciary Duties

“As a public official, a notary is not acting on behalf of him/herself or his/her employer when performing a notarial act, but rather, on behalf of the state of Montana.” MNPH, page 1.

“The Notary shall, as a government officer and public servant, serve all of the public in an honest, fair, and unbiased manner.” NPCPR, Guiding Principle I.

Government officers are generally viewed to be fiduciaries of the members of the public they serve. See generally, Michael Closen, “The Public Official Role Of The Notary,” 31 JOHN MARSHALL LAW REVIEW 651-702 (1998) [especially at 662-675].

B. Importance of Notarization in the Opinions of Courts & Agencies

“American case law teems with references to the indispensable role notarizations play in our society.” Peter Van Alstyne, NOTARY PUBLIC ENCYCLOPEDIA (2001), at Introduction.

[1] Significant Feature of Document Security & Integrity

In most transactional settings, the parties involved or in attendance, are not disinterested. Sometimes, they even occupy adversarial positions. The governmentally commissioned, impartial witness on hand is the notary, and s/he may be the only unbiased party present. Many of the most important documents in peoples lives are notarized. One of the functions of the notary is to protect the interests of document signers.

“The notary acts as an official, unbiased witness to the identity, the comprehension, the intent [or willingness], and the signature of the person who comes before the notary ...” MNPH, page 2.

[2] Critical to Legal System

Documents important enough to be notarized often include real estate deeds and mortgages, estate planning documents, litigation documents, and even many private contracts. Almost always, these documents are intended to be filed for the public record, to be filed and used in litigation, or to be submitted for other parties to review and rely upon.

Case: In a fairly recent domestic relations case in the State of New York, the notary public in performing an acknowledgment notarization of a document neglected to notice that the notarial certificate omitted the key points [a] the notary identified the person executing the document, and [b] the person signing was the person identified in the document. The state's highest court, the New York Court of Appeals, issued an important decision reflecting the significance of notarizations and placing responsibility on notaries to properly perform their fundamental duties. The Court opined: "The purpose of the certificate of acknowledgment is to establish that the [two above omitted] requirements have been satisfied." *Galetta v Galetta*, No. 94, at slip opinion page 7 (NY 5-30-13). The court held the notarial certificate to be essential to a valid notarization. *An acknowledgment "necessarily imposes on the signer a measure of deliberation in the act of executing the document."* Just as in the case of a deed where *the law puts in the path of the grantor 'formalities to check haste and foster reflection and care ... [h]ere, too, the formality of an acknowledgment underscores the weighty personal choice* to relinquish significant property or inheritance rights, or to resolve important issues concerning child custody, education and care." [Id., page 6]

"[T]he role that a notary plays in ascertaining the identity of the person who signs a document, placing that person under oath, if required, and determining the signer's intent and willingness to consent to the transaction is vital in modern society." MNPH, page 1.

Practice Tip: The fact that so many notarized documents are filed with courts and government agencies should cause significant concern for lawyers who might consider engaging in any notarial misconduct.

[3] Notaries Under RULONA Possess Heightened Responsibility To Assess Document Signer Capacity/Awareness

"A notarial officer may refuse to perform a notarial act if the officer is not satisfied that: (1) the individual executing the record is **competent** or has the **capacity** to execute the record; or (2) the individual's signature is knowingly and voluntarily made." RULONA, Section 8(a).

"Determining that the signer is competent and willing to sign the document is ... required." MNPH, page 10.

"The Notary shall require the presence of each signer ... in order to ... observe that each appears aware of the significance of the transaction requiring a notarial act." NPCPR, Guiding Principle III.

*See also, NBPB, Chapter 13, Assessing Document Signer Competence.

[4] Notary Statutes Are Always Incomplete

There is a common law of notarization. Every notary statute is incomplete, for a statute will not describe every step in the notarization process, will not describe in detail how to go about performing the various notarial responsibilities, and will not anticipate every peculiar circumstance or issue that may arise. Consequently, other sources of authority will supplement and explain the meaning of notary statutes – such as court decisions, agency rules and regulations, official state notary public handbooks and manuals, traditional custom and practice, and expert treatises and articles.

*See also, NBPB, Chapter 21, When Notary Statutes Are Silent.

[5] ALL Notary Misconduct by Notaries and Professional-Notaries Involves Other Parties and/or Adversely Affects/Jeopardizes Other Parties

“[E]very notarial act affects the legal rights of others.” MNPH, page 2.

The documents that are notarized, especially at law firms or by certain professionals, are often going to be filed for public record or submitted to courts, so that frauds in notarizing them are aggravated. In addition, client interests are jeopardized. And, the notaries and professional-notaries who commit notary wrongdoing often do so with the assistance or at the direction of other parties, so that a number of individuals are guilty of misconduct.

Moreover, virtually always, notary violations are known to other people or become known to others – such as clients, secretaries, assistants, or associates. Additionally, when professionals commit notarial wrongdoing, almost always professionals do so in the course of representation of their own clients, and professional-notaries usually do so while in the course of notarizing documents they have prepared for their own clients. When individuals become former clients, former employees, and former allies, they may be the ones who report notarial wrongdoing to government authorities. Indeed, for example, the vast majority of lawyer misconduct relating to notarizations that is detected is reported to authorities by former clients, former law firm employees, and former law partners and associates.

Notarizing for one's own client involves the risk of the client turning on the notary or notary-professional, and the uncomfortable risk of the notary or notary-professional becoming a witness against a former client in a legal proceeding.

*See also, NBPB, Chapter 19, Notary Ethics & Avoiding Conflicts of Interest; Chapter 22, Notary Discipline; Chapter 25, Attorneys, Attorney-Notaries, & Conflicts of Interest.

[6] ALL Notary Misconduct by Professionals Involves Multiple Ethics Violations

Even a single violation of a notary statute results in multiple ethics violations. Knowing or intentional violation of a notary statute is a crime – it is official misconduct.

*See also, NBPB, Chapter 19, Notary Ethics & Avoiding Conflicts of Interest; Chapter 25, Attorneys, Attorney-Notaries, & Conflicts of Interest.

[7] Often, Knowing Misconduct Relating To A Notarial Act Constitutes a Crime

When a notary public commits wrongdoing, the unlawful act is called official misconduct. In Montana: "For the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all damages sustained." MCA, Section 1-5-406.

"The county attorney of a county in which a violation of this chapter or another law applicable to notaries public or notarial acts occurs shall prosecute the violation." MCA, Section 1-5-404(2).

*See also, MNA, Section 2-12 [defining official misconduct]; Section 13-6 [criminal sanctions for notarial wrongdoing].

*See also, NBPB, Chapter 22, Notary Discipline.

C. Key Notarizations – Acknowledgement, Jurat, Signature Witnessing, and Oath & Affirmation

[1] Acknowledgement

"Acknowledgment' means a declaration by an individual before a notarial officer that the individual has willingly signed a record for the purposes stated in the record ..." MCA, Section 1-5-602(1).

The signature of the document signer can be affixed either in the presence of the notary, or at a previous time if the signer acknowledges to the notary that the signature is hers/his. No oath/affirmation should be administered.

A notarization of an acknowledgment on a tangible record can be performed remotely in Montana. MCA, Section 1-5-603(7).

*See also, MNA, Section 2-1; Section 9-4 [sample form].

*See also, RULONA, Section 2(1); Section 5(a); Section 16(1) [sample form].

*See also, NLPB, pages 116-117 [with form].

*See also, NBPB, Chapter 4, Acknowledgment Notarizations [with form].

[2] Jurat

“Verification upon oath or affirmation’ means a declaration, made by an individual on oath or affirmation before a notarial officer, that a statement in a record is true.” MCA, Section 1-5-602(15).

The signature must be executed by the document signer in the personal presence of the notary at the time of the notarization, and the signer also must be administered an oral oath or affirmation by the notary pledging that the contents of the document are true and correct.

Practice Tip: The jurat type of notarization is the type employed in an affidavit. A jurat might also be called witnessing a signature under oath, or verification on oath or affirmation.

*See also, MNA, Section 2-7; Section 9-5 [sample form].

*See also, RULONA, Section 2(15); Section 5(b); Section 16(3) [sample form].

*See also, NLPB, page 116 [with form].

*See also, NBPB, Chapter 5 Jurat [Verification On Oath Or Affirmation] Notarizations.

[3] Signature Witnessing

“A notarial officer who witnesses or attests to a signature shall determine ... that the individual appearing before the notarial officer and signing the record has the identity claimed.” MCA, Section 1-5-603(3).

A signature witnessing, or what might also be called attesting a signature, requires that the document signer execute the signature in the personal presence of the notary at the time of the notarization, but it does not include the administration of an oath/affirmation to the document signer.

*See also, MNA, Section 2-21; Section 9-6 [sample form].

*See also, RULONA, Section 5(c); Section 16(4) [sample form].

*See also, NLPB, pages 115-116 [with form].

*See also, NBPB, Chapter 6, Signature Witnessing Notarizations [with form].

[4] Oaths/Affirmations

There are no magic words required to be used by a notary to administer an oath or affirmation. The key is to assure the oath-taker or affirmation-taker is aware that s/he is being placed under oath or affirmation and that s/he is aware the procedure subjects her/him to the law of perjury for knowing and material falsifications.

Distinguish between an oath and an affirmation. However, the two are equally valid in law, each subjects the oath-taker and affirmation-taker to the law of perjury. Must be an oral oath or affirmation.

*See also, MNA, Section 2-2; Section 2-11.

*See also, NLPB, pages 187-195.

*See also, NBPB, Chapter 15, Oral Oaths And Affirmations For Jurat [Verification] Notarizations.

*See generally, Michael Closen, "To Swear ... or Not To Swear Document Signers: The Default of Notaries Public and a Proposal to Abolish Oral Notarial Oaths," 50 BUFFALO LAW REVIEW 613-701 (2002).

[5] Distinguish Transactional Document, Notarial Block [Certificate of Notarization], and Journal Entry

The notarization of a document involves three legally distinct writings [although two of them appear together, and may even appear on the same page]: (1) the transactional document, such as a deed, a mortgage, a will, a contract or a power of attorney – on which the document signer signs or

acknowledges the signature that is to be notarized; (2) the certificate of notarization or notarial block, which must be attached to the transactional document and upon which the notary signs his/her name and affixes his/her official seal; and, (3) the notary journal entry for the notarization, which also must be signed by the document signer.

A Montana notary must complete a certificate of notarization/notarial block as part of all document notarizations. "A notarial act must be evidenced by a certificate signed and dated by a notarial officer." MCA, Section 1-5-609(1)(e).

"Simply affixing your seal and signing your name does not constitute a proper notarization in the state of Montana – EVER!!!" MNPH, page 2.

The notarial certificate/block "must be executed contemporaneously with the performance of the notarial act and include: [1] The venue ... [2] The statement of particulars ... [3] The notary's official signature ... [4] The notary's official seal/stamp ..." MNPH, page 12.

*See also, MNA, Section 2-9; Chapter 9 (Sections 9-1 to 9-9).

*See also, RULONA, Section 15.

*See also, NLPB, pages 110-115.

*See also, NBPB, Chapter 7, Notary's Certificate of Notarization.

CORRECTING NOTARIAL CERTIFICATES. An unusual provision.

"A notarial officer may subsequently correct any information included on or omitted from a certificate executed by that notarial officer. A change or correction may not be made to the impression of a notarial seal or the notarial stamp." MCA, Section 1-5-609(4).

[6] Importance of the Notarial Seal on Certificates

Montana and most states require their notaries to affix their official seals upon notarial certificates as part of the notarization process – always as an important part of the notarization process, and sometimes as an essential element of the process.

What are the reasons why affixing the official seal is so important?

”Official stamp’ means a physical image affixed to or embossed on a tangible record or an electronic image attached to or logically associated with an electronic record.” MCA, Section 1-5-602(8); (13) [“stamping device”].

*See also MCA, Section 1-5-616; 617 [regarding contents of the seal image, security of the seal, exclusive use of seal, disposition on death or termination of notary commission].

*See also, MNPH, page 6 about seals, with a sample image.

*See also, MNA, Section 2-13.

*See also, RULONA, Sections 17 & 18.

*See also, NPCPR, Guiding Principle VII.

*See also, NBPB, Chapter 8, Notary’s Official Seal.

[7] Is the notarization valid when a notary fails to perform the notarization perfectly ?

[a] The Legal Standard Of Substantial Compliance

The law, both statutory law and common law, does not require a notary to be flawless or perfect in the performance of his/her responsibilities. Instead, in most states in order for a notarization to be valid, the notary’s performance must have substantially complied with legal requirements.

Practice Tip: The notary journal entry can provide valuable assistance in establishing the substantial compliance of a notary’s performance.

*NLPB, pages 120-130.

*NBPB, Chapter 7, Section 7.7 [substantial compliance doctrine].

[b] Montana and RULONA have included a statutory provision in regard to the validity of notarizations. This provision certainly trumps the common law substantial compliance doctrine, at least to some extent. However, this statutory provision is not perfectly clear.

The Montana statutory provision entitled “Validity of notarial acts,” reads, in part, as follows: “... the failure of a notarial officer to perform a duty or meet a requirement specified in this part does not invalidate a notarial act performed by the notarial officer. The validity of a notarial act under this part does not prevent an aggrieved person from seeking to invalidate the record or transaction that is the subject of the notarial act or from seeking other remedies based on the laws of this state, other than this part, or the laws of the United States. This section does not validate a purported notarial act performed by an individual who does not have the authority to perform notarial acts.” MCA, Section 1-5-624.

The same provision appears in RULONA, Section 26.

What does this provision mean?

The official RULONA commentary to this section states:

“This section makes it clear that ... the failure of the notarial officer to perform the duties or to meet the requirements of this act does not invalidate the notarial act performed by the notarial officer. For example, a notarial act performed by a notary public whose assurance or surety bond may have expired or been cancelled is not invalidated. However, this provision only applies to a person who is a notarial officer. The section does not legitimate a notarial act attempted to be performed by a person who does not have the authority to perform the act. For example, an individual who does not have a valid commission as a notary public cannot perform notarial acts and any attempted notarial act would be invalid.

“Despite the fact that a notarial act may be valid, the underlying record or transaction may be invalid and may be set aside in appropriate legal proceedings. For example, the underlying record may be the product of fraud, whether performed by the notarial officer or by a third person. In accordance with other law of this state, an action may be brought to invalidate or set aside the record and obtain restitution and other relief.”

The statutory language in referring to the “failure” or faulty performance of the notary is in the singular – failure to perform “a duty” or to meet “a requirement” [although the Commentary uses the plural]. What if there are multiple faults, as there often are?

What if the notary:

1. Notarizes his or her own signature [MCA, Section 1-5-625(1)(a)].
2. Notarizes when the notary has a direct financial interest in the document or transaction (an actual conflict of interest) MCA, Section 1-5-625(1)(b)].
3. Does not require the document signer to be present for the notarization.
4. Does not attempt to identify the document signer.
5. Does not attach a notarial certificate.
6. Does not affix the notarial seal to the notarization.
7. Does not administer an oral oath or affirmation for a jurat notarization.
8. Does not date the notarization.
9. Does not sign the notarization.
10. Does not prepare a journal record entry for the notarization.
11. For a remote electronic notarization, does not utilize approved technology, does not make an audio-video recording of the notarization, and/or does not limit the notarized document or transaction to real property located in Montana or personal property titled in Montana or under the jurisdiction of a Montana court.

D. Identification of Document Signers

[1] To Prevent Impersonation, Forgery, Fraud

[2] Examine ID Document(s) – Shows Reasonable Care

Note: Montana allows identification of a signer through the notary's personal knowledge of the signer and through the oath/affirmation of a credible witness. See MCA, Section 1-5-603(8), (9)(b).

[3] Insist on ID Bearing Signature, Description & Photo [Compare Three Signatures & Compare Three Images (Person, Photo, Description)]

“A notarial officer has satisfactory evidence of the identity of an individual appearing before the notarial officer if the notarial officer can identify the individual: (a) by means of:

(i) a passport, driver’s license, or government-issued nondriver identification card, which may be current or expired, and if expired may not be expired for more than 3 years before the performance of the notarial act; or

(ii) another form of government identification issued to an individual, which:

(A) may be current or expired, and if expired may not be expired for more than 3 years before the performance of the notarial act;

(B) must contain the signature or a photograph of the individual; and

(C) must be satisfactory to the notarial officer ...” MCA, Section 1-5-603(9).

“A notarial officer may require an individual to provide additional information or identification credentials necessary to assure the notarial officer of the identity of the individual.” MCA, Section 1-5-603(10).

*See also, MNA, Section 2-20.

*See also, RULONA, Section 7.

*See also, NBPB, Chapter 10, Identifying Document Signers.

[4] Legal Standard of Reasonable Care

“A notary has a legal obligation to know Montana notary laws and to follow the standards of reasonable care for performing a notarial act.” MNPH, p. 1.

Notaries are not the guarantors of the true identities of the document signers for whom the notaries perform notarizations. Instead, notaries are legally required to exercise reasonable care to determine the identities of document signers. If then, an imposter succeeds in convincing a notary who has acted with reasonable care in attempting to ID the signer, the notary will not have liability for resulting harm.

*See also, NBPB, Chapter 10, Identifying Document Signers.

[5] Record ID Process in Notary Journal As Evidence of Reasonable Care

*See MCA, Section 1-5-618(3)(f), requiring the notary journal “if the identity of the individual for whom the notarial act is performed is based on satisfactory evidence, a brief description of the method of identification and the identification credential presented, if any, including the date of issuance or expiration of any identification credential.”

*See also, RULONA, Section 19.

*See also, NBPB, Chapter 17, Notary Journal Records.

E. Physical Presence Requirement for Signers

[1] Cardinal Feature of ALL Notarizations

*MCA, Section 1-5-603(1)-(3), referring in all instances of notarizing acknowledgements, jurats, and signature witnessings to “the person appearing before the notarial officer.”

“RULE #1 ... The person whose signature, oath, or acknowledgement is being notarized MUST personally appear to the notary at the time the notarial act takes place.” MNPH, page 2.

“There are no exceptions to this requirement. It is impossible to be a witness to an event if it does not take place in your presence.” MNPH, page 2.

“Real-time, two-way audio-video notarizations (remote notarizations) shall only be performed using technology that allows the individuals communicating to simultaneously see and speak to one another.” Montana Administrative Rules, Secretary of State, Chapter 15, Rule 44.15.108(1).

*See also, RULONA, Section 6.

*See also, NPCPR, Guiding Principle III.

*See also, NBPB, Chapter 9, Physical Presence Requirement For Signers.

[2] Essential To Perform Assessments of Document Signer Identity, Competence, and Willingness

Previously, there has been an ongoing debate about whether notaries have the responsibility to judge the competence or understanding of document signers.

*See generally, Michael Closen & Klint Bruno, "Notaries Public And Document Signer Comprehension: A Dangerous Mirage In The Desert Of Notarial Law And Practice," 44 SOUTH DAKOTA LAW REVIEW 494-551 (1999).

The RULONA and Montana have established this guideline for notaries: "A notarial officer may refuse to perform a notarial act if the notarial officer is not satisfied that: (a) the individual executing the record is competent or has the capacity to execute the record; or (b) the individual executing the record is signing knowingly or voluntarily." MCA, Section 1-5-622(1). See RULONA, Section 8(a).

*See also, NBPB, Chapter 13, Assessing Document Signer Mental Competence.

*See also, NBPB, Chapter 14, Assessing Document Signer Willingness.

[3] Most Frequent & Serious Notary Fault Nationally Is To Notarize For Absent Document Signers

[4] Notary Should Record Signer Signature in Journal, Proving Presence

*See MCA, Section 1-5-618(3)(d), requiring the journal entry to include "the signature of each individual for whom the notarial act is performed ..."

The most important and critical element of the journal is the signature of the person for whom the notarization is performed. "This proves the signer personally appeared to you at the time the notarization was performed." MNPH, page 11.

*See also, NBPB, Chapter 17, Notary Journal Records.

F. Remote Notarizations

[1] Interstate Recognition of Montana Remote Electronic Notarizations

Montana is one of the very few states which have adopted remote notarization statutes. Remote notarizations that are lawfully performed in Montana and in states with such laws will be recognized in other US jurisdictions under interstate recognition of notarization laws or under the US Constitution's Full Faith and Credit Clause [although no definitive case of the US Supreme Court has yet addressed this latter issue]. **Except for Iowa.**

*See also, MCA, Sections 1-5-615, 1-5-618(4).

*See also, Michael Closen, "The Public Official Role Of The Notary," 31 JOHN MARSHALL LAW REVIEW 651, 694-701 (1998).

*See also, NBPB, Chapter 27, Interstate and International Recognition of Notarizations.

[2] Personal, Physical Presence Requirement For Document Signers

Under the new remote notarization laws in Montana and elsewhere, the physical presence of the document signer at the notarization is still required, but "physical presence" has been redefined or expanded to include real-time presence by way of simultaneous audio, video, and online communication between the notary and the document signer.

Notice how Montana now defines personal or physical presence for the document signer: the signer must personally APPEAR TO the notary. That is, the signer must be visible to and heard by the notary.

"Real-time, two-way audio-video notarizations (remote notarizations) shall only be performed using technology that allows the individuals communicating to simultaneously see and speak to one another." Montana Administrative Rule 44.15.108(1).

*See also, MCA, Section 1-5-615(3).

*See also, MNPH, Rule #1, page 2.

[3] REQUIREMENTS. Under the Montana law, a remote notarization must satisfy a number of requirements:

a. The notary must be within the Montana at the time of the notarization.

*See MNPH, page 3 ["The jurisdiction for performing remote notarizations is limited strictly to within the borders of Montana."] "A notary public IN THIS STATE may ..." perform remote notarizations [emphasis added]. MCA, Section 1-615 (3).

b. The notary must advise the Secretary of State that the notary will be performing notarizations involving electronic methods, identify the technology to be used, and obtain approval from the SOS.

c. There must be two-way real-time audio-video communication between the notary and signer.

- d. Tamper-evident technology must be used to perform the notarization, as approved by the SOS..
- e. The transaction must (1) involve real property located in Montana, (2) involve personal property titled in Montana, (3) be under court jurisdiction in Montana, or (4) be pursuant to a proxy marriage.
- f. Remote notarizations may be performed for acknowledgments and jurats, but apparently not for simple signature witnessings.

*See MCA, Section 1-5-615(3) states: "A notary public in this state may perform acknowledgments or verifications on oath or affirmation by means of a real-time, two-way audio-video communication, according to the rules and standards established by the secretary of state ... "

A remote notarization can be done [1] for an acknowledgment of a tangible document, or [2] for either an acknowledgment or a jurat [verification on oath or affirmation] of an electronic document.

- g. An electronic recording of the audio-video ceremony must be captured by the notary and preserved by the notary for 10 years.
- h. The other usual elements of a document notarization must be satisfied, including identification of the document signer, acknowledging or signing of the transactional instrument, assessment of the signer's willingness and understanding, administration of an oath or affirmation in the case of a jurat notarization, and completion and preservation of a notary journal entry.

*See also, MCA, Section 1-5-615, 1-5-618(4).

[4] Key Points For Review About Remote Electronic Notarizations

- a. Notary must be in Montana; signer may be anywhere.
- b. Personal appearance of signer required.
- c. Only certain kinds of transactions may be remotely notarized.
- d. Recording of the audio-video ceremony must be made and preserved.
- e. Notarization technology must be tamper-evident [but what about the electronic recording of it?].
- f. Standard notary journal entry must also be completed.

G. Notary Journal Requirement and Its Purposes

[1] Notary Journal Record-Keeping Is Critical To Proper Public Official Functioning

*See generally, Michael Closen & Charles Faerber, "The Case That There Is A Common Law Duty Of Notaries Public To Create And Preserve Detailed Journal Records Of Their Official Acts," 42 JOHN MARSHALL LAW REVIEW 231-461 (2009) [a 230 page article, including 943 footnotes].

*See also, Michael Closen, Trevor Orsinger & Bradley Ullrick, "Notarial Records and the Preservation of the Expectation of Privacy," 35 UNIVERSITY OF SAN FRANCISCO LAW REVIEW 159-253 (2001).

[2] Contemporaneous, Bound/Secure, Chronological, Detailed

"All Montana notaries are required by law to maintain one or more journals in which all notarial acts are recorded. The journals may be either a permanent, bound paper journal designed to deter fraud or a permanent, tamper-evident electronic journal." MNPH, page 7.

*See MCA, Section 1-5-618.

The form of the notary journal, whether paper or electronic [or both] may be chosen by the notary. "There are different formats available; you may choose whichever you prefer as long as the records are chronologically numbered and the book is designed in such a way as to deter any deletion, alteration or modification of the pages. You may not use a loose-leaf notebook." MNPH, page 7.

*See also, NPCPR, Guiding Principle VIII.

*See also, MNA, Section 2-6; Chapter 7 (Sections 7-1 to 7-6).

*See also, NBPB, Chapter 17, Notary Journal Records.

[3] Elements of Journal Entry

Montana specifies certain information which must be included within the notary journal entry. But, other relevant information may be included to assist the notary in recording and in recalling the notarization, such as any witnesses to the ceremony or any unusual circumstances. MNPH, page 11.

*MCA, Section 1-5-618(3),

- “(a) the date and time of the notarial act;
- (b) a description of the record, if any, and the type of notarial act;
- (c) the full name and address of each individual for whom the notarial act is performed;
- (d) the signature of each individual for whom the notarial act is performed ... ;
- (e) if the identity of the individual for whom the notarial act is performed is based on personal knowledge, a statement to that effect;
- (f) if the identity of the individual for whom the notarial act is performed is based on satisfactory evidence, a brief description of the method of identification and the identification credential presented, if any, including the date of issuance or expiration of any identification credential; and
- (g) the fee, if any, charged by the notary public.

As noted above, the most important element of the journal entry is the signature of the document signer, because that signature in the journal provides proof that the signer was physically present to the notary when the document was notarized.

*See also, MNA, Section 7-1.

*See also, NBPB, Chapter 17, Notary Journal Records.

[4] ***PRACTICE TIP: Complete Journal Entry First***

Completion of the journal entry first [before the certificate of notarization, or notarial block] has advantages before, during, and after the notarization.

“The final step in the notarization process is ... completing the notarial certificate/block.” MNPH, page 12.

[5] **Protecting Signer Privacy**

Journal is required to be preserved for 10 years from the date of its last Entry. MCA, Section 1-5-618(1).

Do not record private identifier information such as Social Security numbers, birth dates, credit card numbers, ID card numbers. MNPH, page 11.

*See also, NBPB, Chapter 18, Document Signer Confidentiality & Privacy.

The journal should be kept under lock and key within the exclusive control of the notary. No one else should be allowed to possess or even handle the journal.

Consider issues of possible public record status and accessing journal entries (and recording requests for access and their disposition).
“[N]otary journals could be subject to public review ...” MNPH, page 11.

[6] Electronic Journals

The notary may use either a hardbound paper journal or an electronic journal, or both, regardless of whether notarizations are done on paper or electronically.

“The information required to be entered into the journal is the same for both paper and electronic journals – only the method of recording is different.” MNPH, page 11.

[7] Journal Assures Signer Presence, Accurate Present Date, Tamper-Proof Process

“A properly kept notary journal is the very best insurance that a notary can have.” MNPH, page 3.

[8] Journal Entry Can Substitute For, Cure Defects In, Notarial Certificate

[9] Journalize Refusals To Notarize, As Well As Unusual Circumstances

A refusal to notarize is an official act and should be recorded.

Recording a refusal to notarize should include the objective reason(s) for the refusal, and may serve to deter a wrongdoer from making another attempt to obtain a notarization from another notary.

*See generally, NBPB, Chapter 17, Notary Journal Records.

H. Liability of Notary and Notary-Employers

[1] Notary Liability Is Unlimited

“Montana case law holds the notary personally responsible for any damages resulting from the notary’s official misconduct.” MNPH, page 3.

[2] Standard of Reasonable Care for Notaries

“A notary has a legal obligation to know Montanan notary laws and to follow the standards of reasonable care for performing a notarial act” MNPH, page 1.

A notary is not a guarantor of the correct identity of a document signer, and a notary will not have liability if the notary has exercised reasonable care to identify the signer, where the signer nevertheless is a skillful imposter.

A notary is not required to perform the steps in a notarization perfectly, provided the notary has substantially complied with the legal requirements.

Of course, a notary is required to act with the utmost integrity, honesty, and impartiality.

*See also, NBPB, Chapter 20, The Savvy Notary and Avoiding Liability.

[3] Notary-Employer Vicarious Liability (Including Law Firms, Banks, etc)

The law is well established that employers of notaries can be vicariously liable for both the negligent and intentional wrongdoing of notary-employees, under state statutes and/or the common law.

As Montana has no statutory section imposing vicarious liability on notary-employers, the common law of agency will govern whether, and under what circumstances, an employer can also be held liable for a notary's wrongdoing. It is called the scope of employment doctrine.

*See also, NBPB, Chapter 24, Proper Roles of Notary-Employees and Their Employers.

[4] Notary Bonds and E & O Insurance

*MCA, Section 1-5-619(4)(d) (\$10,000 bond for a 4-year term). See also, Montana Administrative Rule 44.15.103.

“Many notaries think that the bond is insurance that protects them; that is not the case. The bond is posted to cover damages incurred by the victim of the notary's negligence or malfeasance. If a successful claim is made against the ... bond, the notary will have to pay the bonding company back and cover any losses in excess of \$10,000 as well.” MNPH, page 3.

“Montana does not require notaries to obtain liability insurance; however, it is wise to discuss the need for such coverage with an insurance professional.” MNPH, page 3.

What position does a notary bond company usually take when a claim is pursued against the bonded notary? What is the legal effect of the bond company paying the amount of the bond to the complainant? Is there a release of the notary from further liability? Will the amount paid by the bond company act as a set-off against the remaining liability of the notary? See the Montana Supreme Court case of *McWilliams v Clem*, 743 P2d 577 (1987).

*See also, NBPB, Chapter 23, Notary Bonds and Liability Insurance.

*See also, NLPB, Notary Bonds, pages 277-294.

[5] ***PRACTICE TIP: Check Legal Malpractice Insurance, As Some Policies Expressly Exclude Notarial Acts***

[6] Administrative Agency and Criminal Law Sanctions

*MCA, Section 45-7-401. Official Misconduct.

(1) A public servant commits the offense of official misconduct when in an official capacity the public servant commits any of the following acts:

(a) purposely or negligently fails to perform any mandatory duty as required by law ... ;

(b) knowingly performs an act in an official capacity that the public servant knows is forbidden by law; ...

(c) solicits or knowingly accepts for the performance of any act a fee or reward that the public servant knows is not authorized by law ...

(2) A public servant convicted of the offense of official misconduct shall be fined not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 month, or both. ...”

*See also, NBPB, Chapter 22, Notary Discipline.

*See also, NLPB, Chapter 9, Criminal and Administrative Sanctions For Notary Misconduct.

Section 2 ... Ethics for Notaries and Professionals

A. Relevant Ethical Standards for Notaries

Are notaries public bound to adhere to standards of ethics? Is there a generally accepted code of ethics for notaries?

*MCA, Section 1-5-620(2), Examination of Notary Public. Mandates an examination for notaries based upon a course of study. "The course must cover the laws, rules, procedures, and **ethics** relevant to notarial acts."

See also, RULONA, Section 22(b) [which includes the same statement as above for testing on notary ethics].

Presumably, everyone would agree that notaries, as public officials, are obligated to meet ethical standards in performing official responsibilities. Yet prior to 1980, no organization or entity, public or private, had ever attempted to set out a statement of the ethical standards to which notaries public should abide.

*See also, Van Alstyne, NOTARY LAW, PROCEDURES & **ETHICS** (1998).

In 1980, the American Society of Notaries published a one-page 12-point Responsibility Code of Ethics [reprinted in 32 JOHN MARSHALL LAW REVIEW at 1195 (1999)]. Some 15 years passed without action on ethics. Then, in about 1996, the National Notary Association appointed a drafting committee to take on the challenge of preparing a more thorough notary ethics code. The NNA's efforts to identify and publish such a set of standards resulted in the publication of an extensive document some 30 pages in length, containing 10 Guiding Principles, along with numerous sub-parts, illustrations, and explanations – the **Notary Public Code Of Professional Responsibility** of 1998 [available online from the NNA; also reprinted in 32 JOHN MARSHALL LAW REVIEW at 1123-1193 (1999)].

Not surprisingly, the expansive NNA Code not only addresses the substance of the 12 standards set out in the ASN Code, but also covers numerous other matters. These two codes of notarial ethics are the only published standards, but they have not been adopted or acknowledged as the applicable and official ethics standards by Montana or other states and territories [with the exception that the NNA Notary Public Code of Professional Responsibility has been adopted by the State of Hawaii]. It should be noted that the ASN and the NNA are the country's two largest notary membership, education, and advocacy organizations.

*See also, NBPB, Chapter 19, Notary Ethics & Avoiding Conflicts of Interest.

*See also, Anderson & Closen, "A Proposed Code of Ethics For Notary Employers and Notary Customers: The Companion To the Notary Public Code of Professional Responsibility," 32 JOHN MARSHALL LAW REVIEW 887-933 (1999).

Of course, ethical standards should state generally accepted truths held by thoughtful and honorable members of a profession or calling about the responsibilities they and their colleagues owe to those they serve and those affected by their service.

STANDARDS:

[1] "The Notary shall not execute a false or incomplete certificate, nor be involved with any document or transaction that is false, deceptive or fraudulent." NPCPR, Guiding Principle IV.

*MNA, Section 5-8

*See also, NBPB, Chapter 7, Notary's Certificate of Notarization.

[2] "The Notary shall act as an impartial witness and not profit or gain from any document or transaction requiring a notarial act, apart from the fee allowed by statute" NPCPR, Guiding Principle II.

"To never perform any notarial act in which I am a party in interest or from which I stand to benefit." ASNRCE, point 7.

"To not use the office of notary public as a means of financial gain, for myself or others, in any other business or profession." ASNRCE, point 10.

*MNA, Section 5-5.

*See generally, Michael Closen & Trevor Orsinger, "Family Ties That Bind And Disqualify: Toward Elimination Of Family-Based Conflicts Of Interest In The Provision Of Notarial Services," 36 VALPARAISO UNIVERSITY LAW REVIEW 505-627 (2002).

*See also, NBPB, Chapter 19, Notary Ethics & Avoiding Conflicts of Interest.

- [3] “The Notary shall, as a government officer and public servant, serve all of the public in an honest, fair and unbiased manner.” NPCPR, Guiding Principle I.

“To uphold the trust placed in me by the public I serve.” ASNRCE, point 1.

“To treat each individual fairly and equally ...” ASNRCE, point 3.

- [4] “The Notary shall give precedence to the rules of law over the dictates or expectations of any person or entity.” NPCPR, Guiding Principle V.

“To keep informed of the law regarding the duties and powers of the office of notary public in my jurisdiction and not compromise that law.” ASNRCE, point 9.

- [5] “The Notary shall require the presence of each signer and oath-taker in order to carefully screen each for identity and willingness, and to observe that each appears aware of the significance of the transaction requiring a notarial act.” NPCPR, Guiding Principle III.

“To always satisfy myself as to the identity of the individual appearing before me in my capacity as notary public.” ASNRCE, point 5.

“To always be satisfied that the individual appearing before me understands the contents of the document to be executed or oath to be administered before proceeding.” ASNRCE, point 4.

*MNA, Section 5-8(c).

*See also, NBPB, Chapter 9, Physical Presence Requirement For Document Signers.

*See also, NBPB, Chapter 10, Identifying Document Signers.

*See also, NBPB, Chapter 13, Assessing Document Signer Mental Competence.

*See also, NBPB, Chapter 14, Assessing Document Signer Willingness.

- [6] “The Notary shall affix a seal on every notarized document and not allow this universally recognized symbol of office to be used by another...” NPCPR, Guiding Principle VII.

“To exercise extreme care to insure that the notarial seal, stamp and records are kept in a safe place and are not used by any other person.” ASNRCE, point 11.

*MCA, Section 1-5-416(1)(d),(e).

*MNA, Section 2-13; Section 8-2.

*See also, NBPB, Chapter 8, Notary’s Official Seal.

- [7] The notary must always affix the present date as the date of the notarial act in both the notarial certificate and the notary journal entry for that act.

“Date and Time Notarized: This is the date and the time when you actually performed the notarization; it may or may not be the same as the date of [the] document, which may be earlier but not later than the date of notarization.” MNPH, page 10.

*MNA, Section 7-2(1).

- [8] “To not betray the confidence of any individual appearing before me.” ASNRCE, point 6.

“To never divulge the contents of any document nor the facts of execution of that document without proper authority.” ASNRCE, point 8.

“The notary shall respect the privacy of each signer and not divulge or use personal or proprietary information disclosed during execution of a notarial act for other than an official purpose.” NPCPR, Guiding Principle IX.

*See also, NBPB, Chapter 18, Document Signer Confidentiality and Privacy.

- [9] “The Notary shall record every notarial act in a bound journal or other secure recording device and safeguard it as an important public record.” NPCPR, Guiding Principle VIII.

*MCA, Section 1-5-416(1).

*MNA, Chapter 7.

*See also, NBPB, Chapter 17, Notary Journal Records.

[10] The notary should always exercise diligence, prudence, and reasonable care in order to perform a lawful and valid notarization and to avoid jeopardizing the interests of the document signer and others who rely upon and/or are affected by the notarization.

*See also, NBPB, Chapter 20, The Savvy Notary and Avoiding Liability.

*See also, NLPB, Chapter 8, Civil Liability For Notary Misconduct.

B. Notary As Public Official and Private Employee/Party

*See generally, Michael Closen, "The Public Official Role Of The Notary," 31 JOHN MARSHALL LAW REVIEW 651-702 (1998).

C. Vicarious Liability for Ethical Breaches by Notary

*NLPB, Chapter 10, "Employer Accountability For Notary-Employees," pages 331-356.

*NLPB, Chapter 12, "Attorney Liability For Notary Misconduct," pages 389-416.

D. Relevant Ethical Standards for Attorneys and Other Professionals

Numerous business professionals commonly hold notary commissions – such as accountants, attorneys, bankers, financial planners, health care professionals, real estate brokers, stock brokers, etc. With regularity, some of these professionals draft, prepare, and/or review instruments for their clients and notarize those same documents.

*See also, NLPB, Chapter 11, Notary Services and Ethical Concerns For Lawyers.

*See also, NLPB, Chapter 12, Attorney Liability For Notary Misconduct.

*See also, NBPB, Chapter 25, Attorneys, Attorney-Notaries, and Conflicts of Interest.

[1] Jeopardizing Signer/Client Interests

- a. Cardinal Obligation of a Professional Is To Protect Client Interests
- b. Negligent or Knowing Misconduct Relating To a Notarization
Jeopardizes the Signer's/Client's Case or Transaction
- c. Result Is Both Ethics Violation, and Malpractice (If Client Suffers Loss)

[2] Conflicted Practices by Professional-Notaries

- a. Temptation To Commit Fraud When Professional Occupies Two Roles –
Both Private Professional and Impartial Public Official
- b. Risk Client Will Change Mind and Attack Notarization & Professional
Who Performed It – Result Is Professional Testifies Against His/Her
Own Client or Former Client

This concern is especially problematic for lawyer-notaries, but should be a concern for all other professional-notaries as well. Regarding lawyers: "Another consideration was whether the attorney's role as advocate for a client is compatible with the notary's role as disinterested witness, especially if the notarized document becomes evidence in litigation and the attorney is asked to testify as the supposed impartial notary in a case in which he or she is representing the client." MNA, Comment, Section 5-5(a)(4).

- c. Professionals Who Are Notaries Should Avoid Conflicted Practices (drafting, preparing, reviewing documents and notarizing those documents for their clients).

According to the NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY: "The Notary shall not notarize for a client or customer who will pay the Notary a commission or fee for the resulting transaction, apart from the fee for performing a notarial act allowed by statute." NPCPR, Guiding Principle II-A-2.

[3] There Is An Ongoing Debate About This Subject Of Conflicted Practices By Professionals Who Are Notaries

The debate is a very controversial one, especially in regard to the practice of many lawyer-notaries in performing notarial services for their own clients on documents reviewed, drafted, and/or prepared by those lawyer-notaries.

“A notary is disqualified from performing a notarial act if the notary ... will receive as a direct or indirect result any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the [notary fees].” MNA, Section 5-5(a)(4).

“The gravamen of the problem is that there is a great likelihood the Notary will be more interested in seeing the transaction completed than in following proper notarial procedure. This is so because the notarial fee will be insignificant as compared to the remuneration to be had in the Notary’s other capacity.” NPCPR, Official Commentary, Article II-A-2.

“Since, most probably, the attorney’s fee will exceed the statutory Notary fee, there is a greater financial incentive for the attorney to see the transaction completed, than there is to comply strictly with proper notarial procedures.” NPCPR, Official Commentary, Article II-A-2.

[4] Some authorities and many lawyers favor the practice of lawyers occupying the dual roles of attorneys and notaries for their own clients. Certainly, if an attorney is allowed to serve in the dual capacity of attorney and notary regarding the same document for the same client, then other professional-notaries should be permitted to engage in the such dual activities.

“A notarial officer may not perform a notarial act with respect to a record to which the officer or the officer’s spouse [or civil partner] is a party, or in which either of them has a direct beneficial interest.” RULONA, Section 4(b).

“[I]f a notarial officer is an attorney, the attorney/notarial officer may perform notarial acts for a client as long as the attorney does not receive a direct beneficial interest as a result of operation of the record or transaction with regard to which the notarial act is performed. The fact that the attorney receives a fee for performing legal services, presently or in the future, is not a direct beneficial interest resulting from the record or transaction. Thus, receiving a fee for drafting a will or for subsequently representing the estate are fees for legal services and not a direct beneficial interest received as a result of the operation of the will (record) itself.” RULONA, Official Comment, Section 4(b).

“[A] notarial officer should avoid performing a notarial act in any situation when doing so would raise the appearance of an impropriety.” RULONA, Official Comment, Section 4(b).

[5] With Nearly 4.5 Million Notaries In The US, Professionals Should Not Need To Notarize For Their Own Clients

E. Relevant Attorney Ethics Standards

Lawyers are held to high standards of professional responsibility, higher than for members of the general public. “Lawyers know that no other group or profession sets higher ethical standards [and] disciplines itself so rigorously ...” David Brink, as President of the American Bar Association [THE NEW LAWYER’S WIT AND WISDOM (2001), at 121.]

“In civilized life, law floats in a sea of ethics. ...Without law, we should be at the mercy of the least scrupulous; without ethics, law could not exist.” Chief Justice Earl Warren, U.S. Supreme Court [Id., at 123.]

The standards listed below are among the ones most commonly violated by attorney-notaries and non-notary attorneys when they engage in notarial misconduct. Remember that notary misconduct often involves falsification of dates, signatures, details of the notarial certificate (such as certifying the appearance of the signer, and administration of an oath/affirmation); often involves the assistance of clients and others (such as staff notaries or non-notaries) to falsify dates, to forge signatures, and to perform notarizations; often occurs on documents that are presented to others (such as opposing parties); often occurs on documents that are subsequently filed with courts or government agencies (such as affidavits, wills, deeds, etc); and often constitutes official misconduct (a crime).

STANDARDS:

- [1] To act with honesty; not to falsify.
- [2] To refrain from making misrepresentations to opponents, courts, agencies.
- [3] To act with reasonable care and provide competent representation to clients.
- [4] To be diligent in the supervision of subordinate attorneys, paralegals and staff to insure proper performances.

- [5] To supervise subordinates so that they act in compliance with attorney ethics standards.
- [6] To refrain from involving subordinate attorneys, paralegals, and staff in misconduct.
- [7] To act on behalf of clients only upon the authorization of clients.
- [8] To avoid involving clients in misconduct.
- [9] To avoid placing client interests at risk.
- [10] To avoid committing criminal offenses.
- [11] To self-report misconduct.
- [12] To report notarial misconduct by other attorneys and notaries.

Practice Tip/Warning: Almost always when notarial misconduct is committed by an attorney, there will be multiple ethics violations. For instance, if the date of the notarization of an affidavit for a motion is falsified because an attorney directs a staff paralegal to do so, at least 7 of the above standards have been violated [1-2-3-4-5-7-8].

F. Aggravating & Mitigating Factors

[1] Aggravating Factors

- a. Intentional Misconduct
- b. Injury And/Or Harm Caused
- c. Purpose of Financial Gain
- d. Concealing Or Covering Up Misconduct
- e. Pattern, Or Multiple Incidents, Of Misconduct
- f. Failure To Cooperate With Investigators/Bar Agents

[2] Mitigating Factors

- a. Withdrawing From Case Or Transaction

- b. Taking Remedial Steps To Protect Clients & Others
- c. Cooperating With Investigators/Authorities
- d. Absence of Other Ethics Violations

[3] Other Considerations

- a. Lawyers Are Held To Higher Ethical Standards Than Public
- b. Former Clients/Subordinates/Employees May Change Their Minds And Testify Against Lawyers
- c. Be Careful In Asserting So-Called Defenses And Mitigating Circumstances (as noted below)

G. Sanctions

All of the usual sanctions are available, including disbarment, suspension, censure and reprimand (both private and public), warning, payment of costs, ethics education, and others.

Section 3 ... Types of Notary-Related Misconduct

A. Notarizing for Absent Signers, Forging Signatures, False Dating, Inadequate Identification, and Faulty Journalizing

[1] Absent Signers

[2] Forging Signatures

[3] False Dating

[4] Inadequate Identification

[5] Faulty Journalizing

B. Failure to Administer Required Oral Oaths/Affirmations

[1] Legal Requirement for Oath/Affirmation To Implicate Perjury Law

[2] One of Most Frequent Failures by Notaries

[3] Ceremonial Elements & Language

[4] Note Administration of Oath/Affirmation in Journal

C. Misrepresentations to Recorders, Agencies and Courts

[1] Documents Important Enough To Be Notarized Are Almost Always Filed With Recorders, Agencies and/or Courts

[2] Professional Who Knows of Faulty Notarization Therefore Makes A Knowing Misrepresentation to the Recorder, Agency and/or Court

D. Involving Clients and Subordinates in Misconduct

[1] Professional Cannot Commit/Direct Notary Misconduct Without Someone Else Assisting In, Or At Least Knowing About, the Wrongdoing

[2] Serious Ethical Offense For A Professional To Involve Other Innocent Individual(s) In Notary Misconduct – Other Person(s) Are Then At Risk

E. Failure to Properly Supervise Notary Subordinates

F. Criminal Violations – Official Misconduct

G. Compounding The Offense With Pathetic Excuses

[1] “I Did Not Know Notary Law”

[2] “Everybody Does It”

[3] “The Notary Violation Was Insignificant/Unimportant”

[4] “No One Was Hurt By the Notary Violation”

[5] “I Was Trying To Help My Client” or “My Client Would Have Wanted Me To Do It”

[6] “Someone Else Committed The Notary Violation”

H. A 10-Point Notary Oversight Plan For Companies and Law Firms

See Michael Closen & Christopher Shannon, “The 10 Commandments of Notarial Practice for Lawyers,” FLORIDA LAND TITLE NEWS, Summer/Fall 1999, pages 30-31, 38.

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******* NOTE: The Bibliography in the book PROFESSOR CLOSEN'S NOTARY BEST PRACTICES (National Notary Assn 2018) contains citations to some 250 articles, papers, and books on notary law, ethics, and practice. *******

